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Supreme Court, U.S.
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No. 98-969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HARMONIC DESIGN, INC., and
SPRINGS INDUSTRIES, INC., and
SPRINGS WINDOW FASHIONS DIVISION, INC.,
Petitioners,

vs.

HUNTER DOUGLAS, INC., and
HUNTER DOUGLAS FABRICATION COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONERS' REPLY BRIEF

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I

BECAUSE THE DISTRICT COURT HAS VACATED RESPONDENTS' NOTICE OF DISMISSAL, THAT NOTICE CANNOT RENDER THIS PETITION MOOT

Respondents did not oppose the instant Petition for Writ of Certiorari on the merits. Indeed, they conceded that the Federal Circuit's decision announced a "new doctrine of qualified immunity," Opp. at 5, amounting to a "significant change in the law," *id.* at 9. They merely argued that their filing in the district court of a Notice of Dismissal Without Prejudice had rendered the Petition moot.

Because Respondents filed their purported Notice after the district court granted Petitioners' motion to dismiss with prejudice, that Notice was grossly defective. Therefore, Petitioners moved the district court to vacate the Notice and, on February 9, 1999, the district court promptly granted the motion, holding that it would "not condone [Respondents'] attempt to evade Supreme Court review." Accordingly, Respondents' Notice of Dismissal, the sole basis for their argument against the granting of certiorari, is simply a nullity and of no effect.

II

RESPONDENTS' VAGUE STATEMENTS THAT THEY DO NOT "CURRENTLY" INTEND TO PURSUE THEIR CLAIMS DO NOT RENDER THIS PETITION MOOT

Respondents' representations in their Opposition regarding their current lack of interest in pursuing their claims similarly cannot render this Petition moot.

To moot litigation, a respondent must at least represent to this Court that it has withdrawn its claims *"permanently." Deakins v. Monaghan*, 484 U.S. 193, 200

(1988). Respondents have never made such a representation. The Opposition itself states only that Respondents are not "currently" interested in pursuing their claims. Opp. at 2. Moreover, Respondents fought vigorously, albeit unsuccessfully, in the district court to defend their Notice of Dismissal *Without Prejudice* for the sole purpose of preserving their ability to litigate their claims in the future.

Respondents' statements and actions conclusively disprove that Respondents intend to permanently withdraw their claims. For this additional reason, the Petition is not moot.

III

IF THIS PETITION WERE MOOT, THE COURT SHOULD STILL GRANT CERTIORARI TO VACATE THE FEDERAL CIRCUIT'S DECISION AND REINSTATE THE DISTRICT COURT'S DISMISSAL WITH PREJUDICE

Even if this Court were to find that Respondents' Opposition rendered the Petition moot, this Court should at least grant certiorari for the purpose of vacating the Federal Circuit's decision and reinstating the district court's dismissal with prejudice. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1994) ("vacatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court").

As stated by this Court in *Walling v. James V. Reuter, Inc.*, 321 U.S. 671 (1944), where the actions of a respondent frustrate this Court's review of a circuit court decision, the circuit court decision,

> cannot rightly be made the implement for depriving petitioner of the benefit of his judgment in the District Court. We conclude, therefore, that in the circumstances the only just and appropriate disposition which can be made of this case is that the judgment of the Court of Appeals be vacated, and the judgment of the District Court restored, as though respondent had taken no appeal.

Id. at 677-78. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (where case has become moot, practice is "to reverse or vacate the judgment below and remand with a direction to dismiss").

Here, Respondents can gain no benefit from the Federal Circuits' vacatur of the district court's dismissal with prejudice. Accordingly, if this Petition were moot, vacatur by this Court would be appropriate.

CONCLUSION

Because of the undisputed great national importance of the issues presented, and because the Petition is

manifestly not moot, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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